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CONSTITUTIONAL LAW

I. JUDICIAL REFORM

Under article V of the South Carolina Constitution of 1895,[1] the legislature had created "a hodgepodge of courts, lacking in uniformity and consistency."[2] This jumble consisted of various county courts, municipal courts, and other courts inferior to the circuit courts with overlapping jurisdiction. The new article V, the Judicial Reform Amendment, was designed to rectify this situation.[3] Ratified on April 4, 1973, it was a clear "directive of the people that the court system 'shall be vested in a unified judicial system.' "[4] Section 22 of the new article allowed courts in existence at the time of ratification of the new article to remain until article V could be put into effect through legislation.[5] A week before ratification of article V, the General Assembly passed Act No. 503 which was in accord with article V, section 22. It provided that: "All courts in existence in this State on the effective date of the ratification of article 5 of the State Constitution . . . shall continue in existence, with all the powers and duties vested in them prior to such ratification . . . ."[6]

In this context arose the case of *State ex rel. McLeod v. Court of Probate of Colleton County*.[7] It involved the validity of twenty-nine statutes which related to various courts throughout the state. The Attorney General sought a declaratory judgment, contending that the acts violated article V, section 1 because they did not further the goal of a unified judicial system. Twenty-five actions, which were decided together, were classified by the court into four separate groups:[8] the first group challenged acts which

1. S.C. CONST. of 1895, art. V, § 1.

2. State *ex rel.* McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 284, 223 S.E.2d 166, 169 (1975).

3. S.C. CONST. art. V, § 1 now reads as follows: "Judicial power vested in certain courts. — The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law."

4. Cort Indus. Corp. v. Swirl, Inc., 264 S.C. 142, 146, 213 S.E.2d 445, 446 (1975).

5. S.C. CONST. art. V, § 22.

6. No. 503, [1973] S.C. Acts & Jt. Res. 868.

7. 266 S.C. 279, 223 S.E.2d 166 (1975).

8. In addition to the four groups of actions there was a complaint against the Civil and Criminal Court of Darlington County alleging that an act which allowed Judge D. Carl Cook to serve another term beyond the mandatory retirement age was violative of both article V, § 1 and article III, § 34, cl. IX. The supreme court found the act "a special

attempted to alter the jurisdiction of the courts involved; the second group contested acts which purported to create new local courts; the third group involved acts creating new judgeships for courts already in existence at the time of the ratification of article V; and the fourth group challenged the validity of statutes relating to several probate courts and one which attempted to create the office of master in equity for Cherokee County.

In deciding the case, the supreme court relied on three previous decisions interpreting article V. The first of these, *Cort Industries Corp. v. Swirl, Inc.*,[9] related to the first group of actions. In *Cort* the supreme court declared invalid an act, passed after the ratification of article V, which attempted to divest the local circuit court of appellate jurisdiction over matters originally decided in the Pickens County Court. It was argued that section 22 allowed the legislature to alter the jurisdiction of courts in existence at the time article V was ratified. The supreme court disagreed. It reasoned that since article V, section 1 required a unified judicial system and section 22 was included only to make less chaotic the transition from the old system to the new one, any piecemeal alteration of the jurisdiction attempted by the legislature was unconstitutional.[10]

The court in *Colleton County* thought that the statutes in group one were similarly infirm. It concluded its discussion of this group by stating:

> Our reasoning in *Cort* is equally applicable to those statutes in group one . . . . These courts are not, however, unconstitutional. They continue to exist with the same powers which each had on April 4, 1973, no more and no less. This is in keeping with new Article V, § 22, and is consistent with Act No. 503 of March 28, 1973, ... The attempted alterations by the several statutes are simply invalid.[11]

Next, the court turned to the second group of statutes which attempted to create new local courts. *State ex rel. McLeod v.*

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law where a general law could be made applicable" and thus it ran afoul of article III, § 34. The article V issue was not reached. *Id.* at 293, 223 S.E.2d at 173.

9. 264 S.C. 142, 213 S.E.2d 445 (1975).

10. *Id.* at 146, 213 S.E.2d at 446. The court added that "[i]f section 22 was allowed the scope advanced by counsel, the local, factionalized court system would be exhumed and article V interred. If we were to accept the view advanced by counsel, the mandate of Section 1 would be rendered a mere hollow formalistic expression of preference for a uniform system." *Id.* at 146-47, 213 S.E.2d at 446.

11. 266 S.C. at 287, 223 S.E.2d at 171.

Knight[12] was controlling. That case involved the validity of a court created pursuant to an act which permitted, but did not require, the establishment of a family court for each county. The act creating the court in question was declared unconstitutional since it would "indefinitely postpone the implementation of the directive of the people that the judicial power 'shall be vested in a unified judicial system.' "[13] The courts in question in the second group were "for all practical purposes identical to" the court in *Knight*. Thus the acts creating them were likewise proclaimed to be inconsistent with article V, section 1 of the South Carolina Constitution.[14]

In discussing the acts in group three, which were intended to create new judgeships for courts existing on April 4, 1973, the *Colleton County* court relied on *State ex rel. McLeod v. Civil and Criminal Court of Horry County*.[15] In that case, an act creating a judgeship for the Horry County Court was held to be an invalid attempt to extend the old system in violation of article V, section 1.[16] Thus, the analogous acts in group three were held unconstitutional by the court for the same reason.[17]

The fourth group involved the constitutionality of all acts that either altered the powers of the judge of probate or created new offices in conjunction with the probate courts of several counties. The defendants in the fourth group argued that the reasoning in *Cort, Knight*, and *Horry County* was not applicable to the probate courts in question. Essentially, their argument was that the legislature could validly provide for alterations in the powers of probate judges since the provision was reasonable and applied equally throughout the state.[18] The supreme court thought the argument was "not without some appeal," but reasoned that, since the probate court system had not been unified, "the argument [lost] its force."[19] Furthermore, the court stated that these acts were also invalid because they "would extend the present non-unified court system by authorizing the addition of associate

12. 264 S.C. 532, 216 S.E.2d 190 (1975).
13. *Id.* at 534, 216 S.E.2d at 191 (quoting S.C. CONST. art. V, § 1).
14. 266 S.C. at 288, 223 S.E.2d at 171.
15. 265 S.C. 114, 217 S.E.2d 23 (1975).
16. *Id.* at 117, 217 S.E.2d at 25.
17. 266 S.C. at 289, 223 S.E.2d at 171-72.
18. *See* Brief for Defendant Klyde Robinson 1-6.
19. 266 S.C. at 291, 223 S.E.2d at 173.

probate judges to existing probate courts, which are not a part of a unified court system mandated by new article 5."[20]

Having declared the acts creating the defendant courts unconstitutional, the court enjoined the courts from further operation.[21] The question of whether the acts of these courts had any validity remained unanswered. Two months later the supreme court supplied the answer in a supplemental opinion.[22] The court determined that, although the courts and judgeships had been unconstitutionally created, the acts of those courts and judges were nevertheless valid and binding. This decision was based on the fact that the now ousted judges had been acting as judges *de facto*.[23] Such a judge is "defined as one who occupies a judicial office under some color of right and for the time being performs its duties with public acquiescence, though having no right in fact."[24] To justify its decision, the court explained further:

> The *de facto* doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action . . . .[25]

Thus the court rejected the argument that, where there is no constitutionally created office, there can be no officer, either *de jure* or *de facto*.[26] Practical considerations rather than verbal technicalities swayed the opinion of the court.

II. HOME RULE

A. *Local Government*

The Home Rule Amendment was ratified by the General Assembly in March of 1973. Section 7 of that article provides:

> The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the res-

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20. *Id.*

21. *Id.* at 293, 223 S.E.2d at 174.

22. *Id.* at 300, 223 S.E.2d at 177.

23. *Id.* at 303-04, 223 S.E.2d at 178-79.

24. *Id.* at 301, 223 S.E.2d at 177 (quoting *In re* Wingler, 231 N.C. 560, 563, 58 S.E.2d 372, 374 (1950)).

25. *Id.* at 302, 223 S.E.2d at 178 (quoting *In re* Wingler, 231 N.C. at 565-66, 58 S.E.2d at 376).

26. 266 S.C. at 305, 223 S.E.2d at 179.

> ponsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of governmental services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.[27]

Article VIII, section 7 was thus designed to change the way counties had been governed since the adoption of the Constitution of 1895.[28] However, questions arose as to how much power had been granted to the counties and how much power had been retained by the General Assembly. One of these questions concerned the extent to which counties were given authority to tax within their boundaries. Seemingly the legislature retained some authority in this area by virtue of article X.[29] Section 5[1] of that article provides that "[t]he corporate authorities of counties . . . may be vested with power to assess and collect taxes for corporate purposes . . . ."[30] Section 6 of article X provides that "[t]he General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds" except for certain stated purposes.[31] These provisions suggested that whether or not counties had power to levy taxes was a question of discretion on the part of the General Assembly. Thus there was a potential for conflict between article VIII and article X.

The case of *Duncan v. County of York*[32] dealt partially with this conflict. In *Duncan* a York County taxpayer brought an action in the original jurisdiction of the South Carolina Supreme Court claiming that Act No. 283 of the 1975 Acts of the General Assembly[33] was violative of article VIII, section 7.[34]

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27. S.C. CONST. art. VIII.

28. *See* Torgerson v. Craver, ___ S.C. ___, 230 S.E.2d 228 (1976); Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975); Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974).

29. S.C. CONST. art. X.

30. *Id.* at § 5[1].

31. *Id.* at § 6.

32. 267 S.C. 327, 228 S.E.2d 92 (1976).

33. S.C. CODE ANN. § 4-9-20 to 1230 (1976).

34. The plaintiff's claim was not restricted to Act No. 283. Also under attack were Act No. 448 of the Acts of 1975, which provided for a referendum to choose a form of government for York County, and Act No. 467 of the Acts of 1976, which divided York County into seven single member election districts. The plaintiff claimed these constituted "laws for a specific county" which are prohibited by article VIII, section 7. The court rejected this claim, holding the two acts valid as "one-shot proposition[s]." Duncan v. County of York, 267 S.C. at 346, 228 S.E.2d at 100-01.

Act No. 283 had been enacted in order to carry out the mandate of article VIII, section 7 that the General Assembly establish alternate forms of government.[35] The act created five forms of county government among which voters in each county could choose by way of referendum. Of the five forms, the first four granted broad powers.[36] Counties choosing the first four forms could conduct their affairs unfettered by intervention of the General Assembly. The fifth form (board of commissioners), in contrast, was given only very restricted powers.[37] The board of commissioners could not levy taxes or appropriate money; it could only propose a budget subject to approval, rejection, or modification by the General Assembly. The board of commissioners could not appoint officials to serve on boards, committees, and commissions; rather the governor was given the authority, subject to the approval of the county delegation, for such appointments.

The plaintiff objected that these severe limitations on a fifth form county's ability to govern itself rendered Act No. 283 unconstitutional. With respect to the power to tax, the plaintiff claimed that "[u]nder the fifth form, the county governing body does not have the power to tax. This specifically contravenes Article VIII, Section 7 of the Constitution."[38] The plaintiff argued that the spirit of home rule required that the counties be given the power to govern themselves and asserted that "[a] county does not control its own affairs when its budget and tax matters are in the hands of the General Assembly."[39]

The defendants' answer to this argument was that the Home Rule Amendment should not be interpreted so broadly. They argued:

> The power to tax different areas within a county at different rates represents a departure from past practices in regard to the creation and support of special purpose districts, but it does not constitute a positive grant of the constitutional power of county-wide taxation which Article X provides "may" be vested in county governments.[40]

This narrow view of article VIII, section 7 was rejected by the

35. 267 S.C. at 338, 228 S.E.2d at 97.
36. *See* S.C. CODE ANN. § 4-9-30 (1976).
37. *See id.* at § 4-9-1030.
38. Brief for Plaintiff at 32.
39. *Id.* at 45.
40. Brief for Defendants at 48-49.

majority. It agreed with the plaintiff that form five was unconstitutional. The General Assembly's retention of this much taxing power, according to the court, was contrary to "[t]he constitutional intent . . . made clear by § 7, that the local governing authority shall have the taxing power."[41] The court added that "[n]ot only does Act No. 283 fail to give the Board of Commissioners, under Form 5, the right to tax at different rates, it gives to it no right whatsoever to tax."[42]

The court had no trouble settling the potential conflict between article VIII, section 7 and article X. It simply stated that "Article X deals in generalities, while Article VIII is a specific mandate."[43] Since the majority thus found that a broad interpretation of article VIII, section 7 could be harmonized with article X, it declared unconstitutional the parts of Act No. 283 which provided for form five.[44]

The dissent objected strongly to the majority's broad interpretation of article VIII, section 7. It agreed with the defendants that the Home Rule Amendment was designed only to change the previously existing practices concerning special purpose districts. It maintained that "[a]rticle VIII does not constitute a grant of the constitutional power of county-wide taxation, which Article X provides *may* be vested in county governments."[45] Interpreting article VIII, section 7 in this narrow fashion was the only way the dissenters saw to harmonize it with article X, sections 5 and 6.[46]

The dissent's primary criticism of the majority's reasoning was that the majority failed to resolve adequately "the patent conflict between Article X and Article VIII."[47] It is true that the majority's interpretation creates a conflict between the two provisions. However, it is also true that the dissent's interpretation gives rise to a conflict. Article VIII, section 7 clearly gives to the counties "power to tax different areas at different rates of taxation;" article X, section 5 just as clearly prohibits such a practice.[48] The dissent argued that, since article X was amended in

41. 267 S.C. at 341, 228 S.E.2d at 98.
42. *Id.* at 342, 228 S.E.2d at 98.
43. *Id.* at 342, 228 S.E.2d at 99.
44. *See id.*
45. *Id.* at 351, 228 S.E.2d at 103 (Lewis, C.J., dissenting).
46. *Id.*
47. *Id.*
48. S.C. CONST. art. X, § 5 provides in part: "The corporate authorities of counties . . . may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction . . . ."

1973 along with article VIII, and section 5 of article X was left intact, section 5 of article X and section 7 of article VIII should be harmonized. But it is impossible to do this. If the uniform taxation requirement of article X, section 5 is construed to have current meaning, "the power to tax different areas at different rates of taxation" is a hollow phrase.

The solution to this dilemma is that article VIII must take precedence since it is the later expression of the will of the electorate. And, once the dissent's "patent conflict" argument is so answered, it appears that the majority's construction is the only reasonable one. It is inconceivable that home rule could have very much meaning at all unless it means that counties have constitutional power to levy taxes for county purposes. Under the dissent's interpretation of article VIII, section 7, the General Assembly could create up to five forms of county government and give to none the power to tax. This would result in a return to the status quo as it existed before the ratification of the Home Rule Amendment. The local delegations to the General Assembly would again be all-powerful in their control over local matters. In reaching the conclusion it did, the court definitely precludes such an event and, in so doing, gives strong meaning to home rule.[49]

B. Special Purpose Bonds

The case of *Torgerson v. Craver*[50] presented, for the second time in as many years, the issue of whether the General Assembly could authorize a bond issue to finance the improvement and maintenance of an airport. A taxpayer had brought a declaratory judgment action on behalf of herself and all taxpayers and property owners in the Charleston County Airport District. She sought to have a 1975 bond act[51] of the General Assembly declared unconstitutional and to have the issuance of the bonds enjoined. The district had been created in 1970 and was, at that time, coterminous with Charleston County.[52] The district was to use the

49. The court's decision is also consistent with S.C. CONST. art. VIII, § 17, which provides: "The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution."

50. ___ S.C. ___, 230 S.E.2d 228 (1976).

51. No. 219, [1975] S.C. Acts & Jt. Res. 280.

52. Edisto Beach was removed from Charleston County and annexed to Colleton County by the General Assembly in 1975. No. 81, [1975] S.C. Acts & Jt. Res. 88.

funds obtained from the issuance of the bonds to acquire the Charleston Airport from the City of Charleston.

Three grounds were advanced upon which the plaintiff urged the court to base a finding that the bond act was unconstitutional: (1) The act violated article VIII, section 7,[53] the Home Rule Amendment, since it took from the county government the authority to operate airport facilities; (2) the act violated article III, section 34, cl. IX,[54] since it was a special law where a general law could be made applicable; (3) the act violated the due process and equal protection clauses of the state and federal constitutions since the taxpayers in the district were burdened with the entire cost of financing facilities which were used extensively by persons in adjacent counties. Since the supreme court found the act violative of article VIII, section 7, discussion of the two latter grounds was omitted.[55] The lower court had found no article VIII violation. It had based its decision on the case of *Kleckley v. Pulliam*.[56] In that 1975 case the supreme court upheld a bond act which authorized a special purpose district, encompassing Richland and Lexington Counties, to raise funds for the improvement of the Columbia Metropolitan Airport. The court construed the Home Rule Amendment to prohibit only special laws which infringe upon the governmental functions "set aside for counties."[57] Since the purpose of the act was "not one peculiar to a county,"[58] but instead, "one of state concern,"[59] it was held that the General Assembly could create a special purpose district without running afoul of article VIII, section 7.[60] The court in *Kleckley* thought important the fact that "[t]o a large segment of the population of this State, the maintenance of the airport is as important as the existence of an interstate highway" and, since the legislature retains

53. S.C. CONST. art. VIII, § 7 (*adopted* 1973). *See* text accompanying note 27 *supra*.

54. S.C. CONST. art. III, § 34, cl. IX. "In all other cases, where a general law can be made applicable, no special law shall be enacted . . . ."

55. The supreme court did not reach the second and third arguments. ___ S.C. at ___, 230 S.E.2d at 230.

56. 265 S.C. 177, 217 S.E.2d 217 (1975).

57. *Id.* at 183, 217 S.E.2d at 220.

58. *Id.* at 185, 217 S.E.2d at 221.

59. *Id.* at 187, 217 S.E.2d at 222.

60. *Id.* In reaching its conclusion, the court distinguished Knight v. Salisbury, 262 S.C. 565, 206 S.E.2d 875 (1974), which involved the validity of a special purpose recreation district within Dorchester County. The basis of the distinction seemed to be that recreation was "an exclusive function of an individual county" whereas operation of airports was not. 265 S.C. at 184-85, 217 S.E. 2d at 220. For a discussion of *Knight, see Constitutional Law, 1974 Survey of S.C. Law*, 27 S.C.L. REV. 311 (1975).

the power to maintain the highway system, by analogy, it might also maintain the Columbia Metropolitan Airport.[61]

Applying *Kleckley* to the facts in *Torgerson*, the trial court found that "it is impossible to distinguish between the Columbia Metropolitan Airport and the Charleston Airport."[62] Consequently, the reasoning in *Kleckley* was held applicable and the validity of the bond act accordingly upheld.[63]

The supreme court reversed. It asserted that the facts in *Kleckley* were "entirely different."[64] The difference was

> that it was absolutely impossible for either the governing body of Richland County or the governing body of Lexington County to provide for the bond issue. *Kleckley* involved a matter with which only the General Assembly could deal. The bond legislation was not for a specific county; it was for a region.
>
> The matter at hand involves problems which can be solved by the local governing body of Charleston County.[65]

Thus the majority's reasoning seems to be based on two differences between the facts in *Kleckley* and those in *Torgerson*: Richland or Lexington County could not provide for the bond issue whereas Charleston County could and the special purpose district involved in *Kleckley* was composed of two counties whereas the district in *Torgerson* was composed of only one.

By advancing the first of these distinctions, the court suggested that where a county is unable to provide a needed service of regional importance, home rule does not prevent the General Assembly from so providing. Certainly this is a plausible limitation on the demand of article VIII, section 7 that "no laws for a specific county shall be enacted . . . ." However, the *Kleckley* court never intimated that it was upholding the bond act because the counties involved could not provide for the bond issue themselves.[66] Therefore, it appears that, by relying on this first distinc-

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61. 265 S.C. at 185, 217 S.E.2d at 221.

62. Record at 37. Among the data upon which the trial court based its finding that the Columbia Metropolitan Airport was indistinguishable from the Charleston airport were the following: Charleston Municipal Airport ranks number 73 in size while Columbia Metropolitan Airport is number 70; the Charleston Municipal Airport is the principal air transportation facility for a six county area in southeastern South Carolina; approximately 17% of all South Carolinians use the Charleston airport. *Id.* at 35-36.

63. *Id.* at 39. The trial court also found against the plaintiff on her two other claims. *Id.* at 37-39.

64. ___ S.C. at ___, 230 S.E.2d at 230.

65. *Id.*

66. *See Constitutional Law, 1975 Survey of S.C. Law*, 28 S.C.L. REV. 259, 264-65

tion, the court was, in effect, reinterpreting *Kleckley*.

The second distinction relied on by the majority is more troublesome. While it is true that two counties were involved in *Kleckley* and only one in *Torgerson*, one must question whether such a distinction was valid for the purposes of article VIII, section 7. The dissent took the position that it was not: "The area taxed does not in itself determine the applicability of Article VIII, Section 7. Applicability of Article VIII, Section 7 is determined by the function to be performed."[67] It, like the lower court, thought that *Kleckley* was controlling since the facts of the two cases were otherwise indistinguishable.[68]

This "area taxed" analysis has greater ramifications than the dissent suggested. That is, if seized upon as an alternative ground for the majority's holding, it could lead to a result which would subvert the goals of article VIII, section 7. Merely by creating a special purpose district composed of more than one county and labelling the matters dealt with "regional," the General Assembly could encroach upon the powers of the counties involved. This apparently would not violate the court's interpretation of article VIII, section 7. It is, of course, possible that the court's language cannot be stretched so far. After all, with its decision in *Torgerson*, the court appears to have steered itself back into the decentralizing spirit of home rule.

III. DISCRIMINATION

A. Bar Examination

The controversy over the use of tests to determine fitness for a profession was addressed by the Fourth Circuit Court of Appeals in *Richardson v. McFadden*.[69] In this case, four black law school graduates challenged the validity of the South Carolina Bar Exam, claiming that the test, as applied to blacks, was discriminatory since it was not proven to be job-related. Two of the appellants, Spain and Kelly, charged in addition that the bar examiners had failed them when they should have passed.

In order to decide the job-relatedness issue, the court first

(1976). It is interesting to note that the dissent made no mention of the majority's reliance on this distinction.

67. ___ S.C. at ___, 230 S.E.2d at 232.

68. *Id.*

69. 540 F.2d 744 (4th Cir. 1976).

had to determine whether to apply the rigorous title VII standard or to employ the usual equal protection tests. The former standard, which the appellants advocated, does not require a showing of discriminatory purpose but merely a showing of racially disparate adverse impact in order to place the burden on the user of a test to prove its validity.[70] The appellants pointed to the fact that the Fourth Circuit had previously incorporated the title VII standard into the equal protection clause in cases where a past practice of state-sanctioned racial discrimination was combined with a disparate effect on blacks.[71] But the court answered this contention by citing *Washington v. Davis*,[72] in which the Supreme Court limited title VII's application in equal protection cases to instances where discriminatory purpose was proven.[73] Since the appel-

70. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

71. The Fourth Circuit had analyzed at least two earlier cases, Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974), and United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973), using the title VII standard in the context of an equal protection claim. *Walston* and *Chesterfield County* were not the only cases viewing title VII as the law of the land in equal protection cases. Other circuits had also elevated the title VII standard to a constitutional level. *See, e.g.*, Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973); Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972); Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970) (dictum).

72. 426 U.S. 229 (1976).

73. In *Washington*, the Supreme Court reversed a decision of the Court of Appeals for the District of Columbia Circuit. Holding that the standards in title VII cases did not necessarily apply in all equal protection cases, the Court said:

> As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

Id. at 238-39. "[I]n our view, extension of the [title VII standard] beyond those areas where it is already applicable by reason of statute, such as the field of public employment, should await legislative prescription." *Id.* at 248.

The Supreme Court in *Washington* expressly disapproved *Chance, Castro, Bridgeport Guardians* and *Southern Alameda Spanish Speaking Organization, supra* note 68, but failed to mention *Walston* and *Chesterfield County, supra* note 67. 426 U.S. at 244-45 n.12. The *Richardson* court advanced three possible reasons for the Supreme Court's omission: 1) Inadvertance; 2) implication that discriminatory purpose is established where adverse racial impact occurs in the context of past discrimination; or 3) implication that school cases like *Walston* and *Chesterfield County* are part of a special context in which the school system has the burden of justifying its action. 540 F.2d at 747 n.5. The court did not feel the need to examine the extent to which *Walston* was affected by *Washington* because, in *Richardson*, there was not sufficient evidence of a history of discrimination. *Id.*

lants could not prove discriminatory purpose,[74] the court analysed the job-relatedness issue under the equal protection clause.

The court was faced with the testimony of the bar examiners that they had designed the test in a manner that would accurately show whether an applicant possessed "the minimal level of competence"[75] needed to practice law in South Carolina. In addition, experts testified that there was a high correlation between bar exam performance and law school performance. The appellants contended that such a correlation was irrelevant since job performance rather than law school performance was what the bar exam should be designed to test.[76]

The court again turned to *Washington v. Davis* and quoted the Supreme Court: "[A] 'positive relationship between the admission test and training course performance is sufficient to validate the former, wholly aside from its possible relationship to actual job performance . . . .'"[77] Since the South Carolina Bar Exam met the *Washington* test and the examiners had made an effort "to intelligently relate the examination questions to the skills involved in the practice of law,"[78] the court held the test valid under the equal protection clause.

Even though the exam itself passed constitutional muster, the question whether the passing score was related to a determination of minimal competency remained to be answered. The court undertook to answer this question by evaluating the exam-

74. The appellants attempted to prove discriminatory purpose by showing that three changes in admission practices to the South Carolina Bar had the effect of excluding blacks. The first was the 1950 elimination of the "diploma privilege" which gave automatic bar admission to graduates of the state's law school. This change corresponded to the graduation of the first class from South Carolina State, the "separate but equal" black law school. Second, in 1957, the practice of reading law was terminated just after a black applicant had gained admission to the bar this way. The third change which the appellants contended was designed to exclude blacks was the elimination of reciprocity after a black from another state bar gained admission to the South Carolina Bar in this fashion.

The court did not think this circumstantial evidence was sufficient to prove discriminatory purpose. It cited the fact that there had never been a state rule barring blacks from law practice in South Carolina. It noted that South Carolina has the highest proportion of black bar members in the country. Also, the bar examiners gave neutral reasons for each of the changes the bar had made in its admission practices. 540 F.2d at 747-48 & n.7.

75. *Id.* at 748.

76. *Id.*

77. *Id.* (quoting *Washington*, 426 U.S. at 250). The court noted that appellant's reasoning, if carried to the extreme, would serve to "invalidate almost all state professional examinations," since, if training school performance is all that is being tested, then training school graduation itself should be the test. 540 F.2d at 749 n.11.

78. *Id.* at 749.

iners' testimony as to the methods they used in grading the tests. Although different methods were used,[79] the court could not determine which one was better designed to arrive at an accurate evaluation of minimal competency. While expressing doubt about the "unprofessional approach used by the Examiners,"[80] the court held that the equal protection clause was satisfied "[i]n view of the fact that all Examiners both designed their exams and assigned scores so as to indicate their judgment as to minimal competency."[81]

In spite of the adverse ruling on the constitutional validity of the bar exam, two of the appellants prevailed on the ground that they personally were denied due process and equal protection in that the examiners had failed them arbitrarily and capriciously. This claim of arbitrary treatment arose from the fact that, in borderline cases, the examiners made their final assessments by referring to subjective comments they had made on the grading sheets. Thus an applicant with a lower cumulative average score, but with more favorable subjective comments than a second one might pass while the second one might fail. The court found "reliance on these comments irreconcilable with the board's contention that numerical scores are used to capture precise gradations in performance."[82] For this reason, the court held that appellants Spain and Kelly had been denied due process and equal protection. Consequently, the court ordered that they be admitted to the bar.[83]

In addition to the appeals by the bar applicants, the examiners had appealed the district court's refusal to dismiss the claim that the due process clause required some kind of review procedure for failing papers.[84] They argued that the requirement of due

79. A score of 70 was the minimum passing score. One examiner testified that he treated the answers as a "totality" and, using 70 as the "magic passing point," gave the answer a numerical grade depending on "the student's evidence of ability in answering the whole." The other examiners used a more mechanical method whereby each answer was given a certain number of points. The points were added up and the highest score was given an "A." The other grades were curved accordingly. The court agreed with the appellants' expert that, under the second method, "it would be almost a matter of pure luck if the '70' thereby derived corresponded with anybody's judgment of minimal competency." *Id.* at 749-50.

80. *Id.* at 740 n. 14.

81. *Id.* at 750.

82. *Id.* at 751.

83. *Id.* at 752.

84. The district court had abstained from hearing the due process issue until it had been presented to the South Carolina Supreme Court. *Id.* at 746.

process was satisfied because the applicants who fail have an opportunity to take the exam again and, if one did have the necessary skills, that fact would be shown on a reexamination.[85] The court rejected this argument noting that the delay and expense of taking the bar exam could be burdensome. In addition, the court pointed out that South Carolina allowed only three attempts to pass the bar whereas in states where reexamination had been found sufficient to meet the demands of due process, applicants were allowed to take the test as many times as they desired.[86]

B. Pregnancy Leave

On December 7, 1976, the United States Supreme Court handed down its decision in *General Electric Co. v. Gilbert*.[87] The opinion answered several crucial questions in the area of employment sex discrimination. In doing so, however, it raised several others. Thus, although the Court held that an employer's exclusion of pregnancy benefits from a company disability insurance program was not discrimination within the meaning of title VII of the Civil Rights Act of 1964,[88] it left open to speculation whether nonrenewal of a teaching contract because a teacher had become pregnant would be considered a violation of the Act. This question is squarely posed by the case of *Mitchell v. Board of Trustees of Pickens County District "A."*[89]

In *Mitchell*, the plaintiff schoolteacher brought an action in the District Court for the District of South Carolina alleging that the Board of Trustees of Pickens County School District "A" had denied her due process and equal protection by failing to renew her contract solely because she had become pregnant. She also claimed that the nonrenewal constituted a violation of title VII of the Civil Rights Act of 1964.[90]

The plaintiff, in early April, 1972, discovered that she was

85. The examiners relied on the cases of Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976), and Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974). *See generally* Comment, *Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?*, 52 B.U.L. REV. 286 (1972).

86. 540 F.2d at 752 n.20. After the suit was begun, as the court noted, South Carolina voluntarily instituted procedures to review failing papers. *Id.* at n.19.

87. 97 S. Ct. 401 (1976).

88. 97 S. Ct. at 413.

89. 415 F. Supp. 512 (D.S.C. 1976).

90. 42 U.S.C. § 2000e-2 (1970).

pregnant. She informed her principal of this fact before the date for negotiating contracts for the following year. Having consulted with a physician and being informed that delivery would take place on or about November 6, 1972, the plaintiff arranged with her principal to remain at work until around November 1, 1972, after which she planned to be absent until January 1, 1973. This arrangement was not approved by the district superintendent, and his decision not to renew the plaintiff's contract for the 1972-73 school year was affirmed by the Board of Trustees.[91]

The district court found that the defendants' decision not to renew the contract was made in good faith. This finding was based on the fact that the school district maintained a policy of refusing to hire applicants who would not commit themselves to a full school year or who anticipated not being able to work the entire contract year. The reason given by the defendants for this policy was that allowing "forseeable periods of extended absence, would disrupt the continuity of the educational and instructional process."[92]

The defendants argued that the existence of this general policy showed that the decision not to renew was not based on the plaintiff's sex, but rather upon a legitimate interest in furthering the education of the district's students.[93] The district court answered this contention by citing the decision of the Fourth Circuit in *Gilbert*: "It is of no moment that an employer may not have deliberately intended sex-related discrimination: the statute looks to 'consequences,' not intent . . ."[94] and concluded that the "consequence" of "defendants' actions in the instant case resulted in the denial of a teaching job to plaintiff solely because of pregnancy."[95]

Even if the failure to renew the contract did operate so as to discriminate against women, the defendants argued further, such discrimination comes within the exception provided in the law, which allows employers to use sex as a criterion where it constitutes "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enter-

91. 415 F. Supp. at 515-16.
92. Brief for Defendants at 12.
93. *See* 415 F. Supp. at 517.
94. *Id.* (citing Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), *rev'd*, 97 S. Ct. 401 (1976)).
95. 415 F. Supp. at 518.

prise."[96] The court also disagreed with this position, finding that, in light of *Cleveland Board of Education v. LaFleur*,[97] "excluding pregnant women from teaching jobs is [not] necessary to the normal operation of a school."[98]

Finally, the defendants relied on *Geduldig v. Aiello*[99] for the proposition that "not every classification concerning pregnancy is a sex-biased classification; and absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the member of one sex or the other there can be no valid claim of sex discrimination."[100] This language is from the controversial footnote 20 in *Geduldig* where Justice Stewart asserted that the classification in question—the State of California had excluded pregnancy benefits from its disability insurance program—was not based on sex since the two groups involved were "pregnant women and non-pregnant persons" and pointed out that "[w]hile the first group is exclusively female, the second includes members of both sexes . . . ."[101] The district court held this language inapplicable since *Geduldig* was a case involving a constitutional claim rather than one based partially on title VII as in the instant case.[102] It cited the following language from the Fourth Circuit's *Gilbert* opinion to buttress its conclusion:

> The test in [*Geduldig*] was legislative reasonableness. Title VII, however, authorizes no such "rationality" test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination on conditions of employment. It is not concerned with whether the discrimination is "invidious" or not. It outlaws all sex discrimination in the conditions of employment.[103]

The court concluded that the school district had violated title VII by failing to renew the plaintiff's contract. Instead of granting the plaintiff relief, however, the court granted the defendants' motion for relief from judgment pending the Supreme

96. *Id.*
97. 414 U.S. 632 (1974).
98. 415 F. Supp. at 518.
99. 417 U.S. 484 (1974).
100. 415 F. Supp. at 519.
101. 417 U.S. at 496 n.20.
102. 415 F. Supp. at 519.
103. *Id.*

Court's decision in *Gilbert* since that case might have "decide[d] controlling issues."[104]

Now the Supreme Court has decided *Gilbert*. It relied heavily on *Geduldig* in reaching the conclusion that denial of pregnancy benefits in a company insurance program is not sex discrimination.[105] To overcome the assertion of the Fourth Circuit that *Geduldig* does not apply to title VII cases, Justice Rehnquist observed:

> While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicates that the latter are a useful starting point in interpreting the former.[106]

Geduldig, because of its "strikingly similar" facts, was held to be "quite relevant."[107] So *Gilbert* reaffirmed the reasoning in *Geduldig* that denial of pregnancy benefits in a disability insurance plan is not sex discrimination since it does not apply to all women but merely to pregnant women. *Gilbert* also extended this reasoning to title VII cases.[108]

However, it is impossible to extend the reasoning in *Gilbert* to a case such as *Mitchell*. In *Gilbert* the Court focused on the benefits which accrued to each sex under the insurance plan and determined that the effect of the plan's underinclusiveness was non-discriminatory:[109] "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[110] In *Mitchell*, however, there is no similar program of benefits on which to focus. One

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104. *Id.* at 520-21.

105. *See* 97 S. Ct. at 407-10.

106. *Id.* at 407.

107. *Id.*

108. Justice Rehnquist, in applying *Geduldig* to title VII cases, said:

> The Court of Appeals was therefore wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII. Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under [title VII], *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all.

Id. at 408.

109. See *id.* at 414 (Brennan, J., dissenting).

110. *Id.*

must focus on the disadvantage that the school district's policy places on women. Since a similar disadvantage is not placed on men, the only conclusion that one can reach is that the district's policy of not renewing the contracts of women who have become pregnant has the effect of discriminating against women.

There is another significant point which demonstrates that *Gilbert* should not extend to invalidate the plaintiff's claim in *Mitchell*. The Supreme Court in *Gilbert* did not overrule *Cleveland Board of Education v. LaFleur* which involved facts very similar to those in *Mitchell*. Although *LaFleur* was decided on due process grounds, Justice Powell concurred on equal protection grounds.[111] Since Justice Powell found himself able to join the majority opinion in *Gilbert*, there is strong indication that the Court's failure to find discrimination in that case should be limited to a context of disability insurance benefits and not extended to situations such as the one in *Mitchell*.[112]

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111. *See* 414 U.S. 632, 652 (Powell, J., concurring).

112. After *Gilbert*, the court reversed its ruling. 46 U.S.L.W. 2112 (D.S.C., filed July 27, 1977).